

FEDERAL MAGISTRATES COURT OF AUSTRALIA

KUMAR v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 995

MIGRATION – Review of Migration Review Tribunal decision – refusal of a Partner (Temporary) (Class UK) visa and a Partner (Residence) (Class BS) visa – no reviewable error – application dismissed.

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.59A, 359A, 424A, 476

Migration Regulations 1994 (Cth), reg.1.15A

Kioa v West (1985) 159 CLR 550

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs

[2005] HCA 24

SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs

[2006] FCAFC 2

VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 72

Applicant:	AMIT KUMAR
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File number:	SYG701 of 2006
Judgment of:	Lloyd-Jones FM
Hearing dates:	20 March & 22 May 2007
Delivered at:	Sydney
Delivered on:	27 June 2007

REPRESENTATION

Counsel for the Applicant:	Mr T Ower on 20 March 2007, Mr J Azzi on 22 May 2007
Solicitors for the Applicant:	Mr R Selliah of Davidson James & Associates
Solicitors for the First Respondent:	Ms D Watson of Australian Government Solicitor

ORDERS

- (1) The name of the first respondent be amended to read ‘Minister for Immigration & Citizenship’.
- (2) The application filed on 3 March 2006 is dismissed.
- (3) The applicant is to pay the first respondent’s costs and disbursements of and incidental to the application.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG701 of 2006

AMIT KUMAR
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

The proceedings

1. These proceedings were commenced by an application under s.39B of the *Judiciary Act 1903* (Cth) invoking s.476 of the *Migration Act 1958* (Cth) (“the Act”) filed in the Sydney Registry of the Federal Magistrates Court of Australia on 3 March 2006 for judicial review of a decision of the Migration Review Tribunal (“the Tribunal”). The Tribunal decision was made on 3 February 2006, affirming a decision of the delegate of the first respondent made on 29 September 2004, refusing to grant the applicant a Partner (Temporary) (Class UK) visa and a Partner (Residence) (Class BS) visa. The applicant seeks relief in the form of constitutional writs against the decision of the Tribunal.

2. A Court Book (“CB”) prepared by the first respondent’s solicitors was filed on 19 June 2006 and I have marked it Exhibit “A”. The contents of the Court Book were read into evidence.
3. The following affidavits were filed in these proceedings:
 - a) An affidavit of Amit Kumar, affirmed on 3 March 2006 (affidavit of the applicant) attached to that affidavit is a copy of the Tribunal decision.
 - b) An affidavit of Sharon Elizabeth Hanstein sworn 19 March 2007 (affidavit of Ms Hanstein) was formally tendered at the hearing of 20 March 2007. Attached to that affidavit is a confidential Exhibit “SH1”. Exhibit “SH1” is subject to a non-publication order pursuant to s.61 of the *Federal Magistrates Act 1999* (Cth) with access be limited to counsel of the respective parties. The exhibit SH1 is marked as a confidential exhibit.

Background

4. The Tribunal decision of M Eftimiou, reference N04/06616, contains the following background information:

Mr Amit Kumar (the visa applicant) a national of Fiji, born on the 14th of September 1982, applied for permanent residence on spouse grounds on 10 June 2004.

The visa application form completed by the applicant incorporated an application for a permanent visa, a Partner (Residence) (Class BS) visa, which normally cannot be granted until 2 years have elapsed since the lodgement of the application, and an application for a temporary visa, a Partner (Temporary) (Class UK) visa, which can be granted immediately, to permit stay until a decision is made on the permanent visa. This process is intended to test whether the relationship is continuing, 2 years after the visa application, before permanent residence is confirmed. The delegate’s decisions to refuse to grant the visas were made on 29 September 2004. (CB 135)

5. The Tribunal’s decision contains the following information under the sub-heading “Evidence”:

11. *The visa applicant was nominated in connection with the visa application by Ms Rachel Sunita Krishna (the nominator), an Australian citizen, who was born in Australia on 26 September 1983.*

12. *the visa applicant claims to have met the nominator in Sigatoka, Fiji on 30 July 2002 and that they married in Australia on 8 May 2004. The evidence provided in support of this includes:*

- *Marriage Certificate between the parties in Australia dated 8 May 2004;*
- *Correspondence address to both parties separately at the same address;*
- *Statutory Declarations from friends and family of the sponsor dated June 2004 attesting to the genuineness of her relationship with the visa applicant;*
- *Statements from the visa applicant and sponsor dated May 2004 describing their relationship and future financial joint plan;*
- *Statutory Declarations from the sponsor's parents dated June 2004;*
- *Photos of the couple together among family and at their wedding/engagement;*

13. *The delegate refused the visa as he was not satisfied that the visa applicant met the definition of spouse as defined in Regulation 1.15A. The delegate was not satisfied the parties were in a genuine and continuing marriage relationship nor was the delegate satisfied the parties had a mutual commitment to a shared life as husband and wife. (CB 136-137)*

Relevant legislation

6. Regulation 1.15A relevantly provides as follows:

1.15A Spouse

(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

(a) in a married relationship, as described in subregulation (1A); or

...

(1A) Persons are in a married relationship if:

(a) they are married to each other under a marriage that is recognised as valid for the purposes of this Act; and

(b) the Minister is satisfied that:

(i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(ii) the relationship between them is genuine and continuing; and

(iii) they:

i. live together; or

(B) do not live separately and apart on a permanent basis.

...

(3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:

...

(af) a Partner (Residence) (Class BS) visa; or

(ag) a Partner (Temporary) (Class UK) visa;

the Minister must have regard to all of the circumstances of the relationship including, in particular:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

- (iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) *whether one party to the relationship owes any legal obligation in respect of the other and*
 - (v) *the basis of any sharing of day-to-day household expenses;*
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for the care and support of children, if any; and*
 - (ii) *the parties' living arrangements; and*
 - (iii) *any sharing of responsibility for housework;*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities;*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

Tribunal's findings and reasons

7. A summary of the Tribunal's reasons are contained in the first respondent's written submissions prepared by Ms Watson and I adopt paragraphs 5 and 7 of those submissions:

5. *The Tribunal affirmed the delegate's decision because it was not satisfied that the applicant was the spouse of the nominator within the meaning of reg.1.15A of the Migration Regulations 1994 ("the Regulations"), in that it was not satisfied that the applicant and the nominator were living in a genuine and continuing relationship which involved a mutual commitment to a shared life together to the exclusion of others. The applicant thereby failed to satisfy the requirements for the visas sought.*

7. *The Tribunal's conclusion, set out at paragraph 5 above, was based on the following findings:*

7.1. *there was insufficient evidence of the financial aspects of the relationship to indicate that it was genuine;*

7.2. *the applicant was not able to satisfactorily explain why he is not residing with the nominator;*

7.3. *there was insufficient evidence that the applicant and nominator hold themselves out to the world as being in a genuine spousal relationship; and*

7.4. *most importantly, credible and significant adverse information before the Tribunal led the Tribunal to find that the applicant and the nominator were not in a genuine and continuing spousal relationship.*

Application for review of the Tribunal's decision

8. On 3 March 2006, the applicant filed an application for review in this Court under s.39B of the Judiciary Act. In accordance with orders made at the first directions, the applicant filed an amended application on 30 October 2006 setting out the following grounds:

1. *Tribunal decision involved jurisdictional error of law in that the Tribunal failed to comply with the requirement of s.359A of the Migration Act:*

Particulars

1. The Tribunal considered that part of the reasons for affirming the decision under review was information given to the Tribunal by the Department of Immigration and Multicultural and Indigenous Affairs. These were information that was specifically about the individual concerned and was not given to the Tribunal by the applicant for the purpose of the application and was not a non-disclosable information. The Tribunal letter dated 31 October 2005 did not adequately disclose the adverse information given to the Tribunal by the Department of Immigration and Multicultural and Indigenous Affairs. Pursuant to s.359A the Tribunal was required to give this information and offer an invitation to comment to the applicant in the form of a document, which it failed to do so.

Submissions and reasons

9. Mr Ower, for the applicant, provided written submissions which state that the Tribunal contravened s.359A of the Act in two ways. First, it did not properly and sufficiently particularise the “confidential third party information” upon which it relied. Secondly, it did not give any particulars of the “other information” contained in the Departmental file. In respect of the “confidential third party information”, Mr Ower submits that the Tribunal relied upon information received from a telephone call from a third party, which it was obliged to reveal to the applicant.(CB 119) However, the s.359A letter described this information in such a general way that it failed to effectively particularise it. No substance was given to the bare allegation, given in confidence, that the marriage was “contrived for the sole purpose of migration to Australia”. This bare allegation presented the applicant with an impossible task. Had proper particulars been provided, the applicant would have had the opportunity to comment meaningfully, instead of merely denying the allegation.

10. Mr Ower referred to the Tribunal's letter pursuant to s.359A of the Act:

The Tribunal has received information, in confidence, stating that your marriage to your nominator is contrived for the sole purposes of migrating to Australia.(CB 128.5)

11. Mr Owers submits that s.359A serves the same purpose as s.424A does in respect of protection visas. In both sections of the Act, there

are strict obligations to give particulars of any information upon which either Tribunal relies on, if whole or part, in coming to its decision.

12. The s.359A letter then states:

This information is relevant to the review because it may lead the Tribunal to find that you and your nominator are not in a genuine and continuing relationship as required by Regulation 1.15A.(CB 128.6)

13. Mr Ower submits that the Tribunal member felt bound by s.359A to disclose information which was adverse. In support of that contention, Mr Ower referred to the following paragraphs from the Tribunal decision:

14. *Subsequently information was supplied to the Tribunal by a person other than the visa applicant which indicated that the visa applicant was not living in a spousal relationship with the nominator...*

17. *The Tribunal advised the visa applicant that confidential information had been received which suggests that his relationship with the nominator is not genuine and that it was contrived for the purposes of immigration. The visa applicant denied the allegation was true.(CB 137)*

14. Although Mr Ower concedes that there was no written response to the s.359A letter, the formal response was made by the applicant during the hearing. Mr Ower argues that the purpose of s.359A is that particulars of an allegation are put so that allegations can be tested.

15. Mr Ower submits that the following paragraph in the Tribunal decision goes further than what was put in the s.359A letter:

26. *In this matter, the Tribunal has received credible information that the parties are not living in a spousal relationship and do not have a requisite commitment to each other.*

16. Mr Ower then referred to paragraph 29 which states:

29. *...Most importantly, the credible and significant adverse information before the Tribunal leads the Tribunal to find that the visa applicant and the nominator are not in a genuine and continuing spousal relationship.*

17. Mr Ower argues that the information from the third party was taken by the Tribunal to be adverse information which was credible and significant. Mr Ower claims that the use of the term “gravamen” has a specific meaning. That the Tribunal applied that term to this information, requires it to give the applicant more particulars for him to adequately respond. To put adverse information to an applicant, Mr Ower relies on *VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72 at [25] and [27] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ, instead of ss.424A and 359A of the Act, which are only the statutory “forms” of procedural fairness:

25. *The existence of that public interest is not to be understood as requiring the conclusion that there is an absolute rule against an administrative decision-maker disclosing to a person, whose interests may be affected by the decision that is to be made, information that has been supplied by an informer. Nor does it necessarily mean that there is an absolute rule against disclosing the identity of an informer to such a person. It is neither necessary nor appropriate to attempt to state some all-encompassing rules about how administrative decision-makers should deal with information supplied in this way. Not least is that because use of the expression "informer" in the context of administrative decision-making not only does not reveal what kind of information is conveyed by the informant, but also does not reveal what relevance the information may have to the decision that is to be made. The application of principles of procedural fairness in a particular case must always be moulded to the particular circumstances of that case.*

27. *The information which was contained in the letter was relevant to that inquiry and it could not be ignored by the Tribunal. The Tribunal was able to put the information aside from consideration in its reasons only because it reached the conclusion, on other bases, that the appellant was not entitled to a visa. But that step, of putting the information in the letter aside from consideration, could not be taken before reaching the conclusion that the application should be refused. It follows that to conduct the review with procedural fairness, the appellant had at least to know the substance of what was said against him in the letter. Only then could he attempt to answer the suggestions made by the*

author of the letter that the appellant had reasons other than Convention reasons to absent himself from Eritrea and that he did not have a well-founded fear of persecution for a Convention reason.

18. Mr Ower submits that in this case, the significant and credible nature of the information before the Tribunal meant that the information could not be put aside and it was obliged to rely upon it.
19. In respect of the second issue, “other information”, Mr Ower submits that the Tribunal noted in its decision that it had considered all the evidence before it.(CB 140.3) Further, that part of the adverse information the Tribunal referred to in that same paragraph consisted of observations made during the home visit by Departmental officers in their report, which was contained in the first respondent’s file and available to the Tribunal. Mr Ower submits that the Tribunal did not particularise this information in the s.359A letter, which contravened that section of the Act and resulted in jurisdictional error.
20. Mr Ower submits that although that paragraph 29 of the decision refers to the third party material, it could be referring to other adverse material. The only material which fits the criteria is the adverse information arising out of the home visit. However, no particulars were given in the s.359A letter, resulting in jurisdictional error: *SAAP v MIMIA* [2005] HCA 24; *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2.
21. Ms Watson, for the first respondent, contends that the alleged breaches of s.359A of the Act are not made out for the following reasons:
 - a) Section 359A does not apply to information that is “not-disclosable information”:s.359A(4)(c). “Non-disclosable information” is defined in s.5 of the Act as including “information or matter...whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence”. The information received in the phone call to the Department and the “other information” (report by Department officers after the home visit) fell within this definition of non-disclosable information and therefore was not the subject of s.359A.

- b) Section 359A does not apply because information on the Departmental file, including information received in the telephone call and the information about the home visit, was not “the reason, or a part of the reason, for affirming the decision that is under review”. The Tribunal did not expressly refer to such information in its decision. Instead, all references in the decision to adverse information about the issue of genuineness of the relationship relate to that provided to the Tribunal directly, and not information from Departmental files. For example, the Tribunal referred to information supplied to it “by a person other than the visa applicant which indicated that the visa applicant was not living in a spousal relationship with the nominator”. The Tribunal noted that “this information was put to the visa application at the hearing and [in the s.359A letter]”: CB137 at [14] (see also CB137 at [17] and [26]; CB140 at [28] and [29]). Contrary to the applicant’s contentions, paragraph 28 of the Tribunal decision does not provide an adequate basis for inferring that the adverse information that was part of the reasons for the decision was information on the Department file rather than information provided directly to the Tribunal.
- c) Even if s.359A does apply, particulars of the information were adequately provided in the s.359A letter.

22. In respect of the first issue, Ms Watson submits that s.359A(4)(c) does not apply to non-disclosable information. Section 5 of the Act states:

“non-disclosable information” means information or matter:

(a)...

(b)...

(c) whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence;

and includes any document containing, or any record of, such information or matter.

23. Ms Watson submits that the Tribunal in the present case attempted to balance the requirements of natural justice by providing as much information as it considered could be disclosed without breaching confidence, and then asking the applicant to comment on that information. The information which was disclosed to the applicant was contained in the s.359A letter.
24. Ms Watson argues that the only thing that could be lacking in relation to the above statement is identity of the person who gave the Tribunal that information. It was sufficient for the Tribunal to have raised with the applicant that the sole motivating factor for him entering into the spousal relationship was migration to Australia. Ms Watson contends that the applicant could have met this either by denying outright, or by providing further information of the kind identified by the Tribunal. The applicant did not do so.
25. In relation to the second issue in respect of information the Tribunal had before it from the Department, rather than information supplied to it by the applicant, Ms Watson referred to how the Tribunal dealt with this. First, it referred to evidence such as statutory declarations and photographs of the couple and their engagement/wedding. It then identified subsequent information supplied by a person other than the applicant which indicated that the applicant was not living in a spousal relationship with his visa nominator. This becomes the critical issue in relation to confidential information and was the only confidential information relied upon which was adverse to the applicant. The information was supplied directly to the Tribunal as opposed to something which was on the Departmental file. This information was put to the applicant at the hearing and by the s.359A letter dated 31 October 2005. The Tribunal gave the applicant 28 days to provide further information or make further comments before it made its decision. However there was no further evidence or comment in response to the s.359 letter.
26. The Tribunal decision states under the sub-heading “Findings”:
21. *The Tribunal findings are based on the material in the Departmental and Tribunal files as well as the evidence given during the hearing.*(CB 138.2)

27. Ms Watson submits that the Tribunal made clear that it was not satisfied of matters which the applicant put to it because of a lack of information.(CB 138.6-139.8) That was the only use that it made of material on the Departmental file.

28. Ms Watson submits that the Tribunal expressing the reasons for its lack of satisfaction, and its thought processes, are not information of the kind which can be caught by s.359A: *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 123. In relation to the confidential information which was the subject of the s.359A letter, the Tribunal was clearly focusing upon material not on the Departmental file, but on communication which was received by the Tribunal after the delegate's decision:

[26] In this matter, the Tribunal has received credible information that the parties are not living in a spousal relationship and do not have a requisite commitment to each other. The gravamen of this information was put to the visa applicant. The visa applicant gave evidence that he is living in a spousal relationship with the nominator.(CB 139)

29. It is submitted that this contradicts the fact that the applicant already told the Tribunal that he was not living with the nominator temporarily. Ms Watson submits that paragraph 27 of the decision deals with all of the documents before the Tribunal and the conclusion it drew.

30. Ms Watson then referred to paragraph 28 of the Tribunal decision, which Mr Ower claims shows the Tribunal misunderstood the authority in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72. It should be noted that the Tribunal cited the Full Federal Court decision *Minister for Immigration and Multicultural and Indigenous Affairs v Applicant VEAL of 2002* [2004] FCAFC 179, although it applied the principles established in the High Court decision. Ms Watson submits that paragraph 28 of the Tribunal decision does not demonstrate any misunderstanding of the principles enunciated in the High Court decision:

28 ...In this case the very significant and credible nature of information before the Tribunal has meant that the

information cannot be put aside and must be relied upon by the Tribunal.(CB 140)

31. Ms Watson argues that the Tribunal was not stating that the High Court decision in *Applicant VEAL of 2002* demands that it do so. It was stating that the High Court made clear that in dealing with confidential information, it is not the case that that information must be given character adverse to the applicant in order for natural justice requirements to be satisfied:

*But it by no means follows that the Tribunal was bound to give the appellant a copy of the letter, or tell him who had sent it, or even tell him that the information had been sent in written form. To give the appellant a copy of the letter or tell him who wrote it would give no significance to the public interest in the proper administration of the Act which, as pointed out earlier, required that those entitled to a visa be granted one and those not entitled be refused. It is in aid of that important public interest that, so far as possible, there should be no impediment to the giving of information to authorities about claims that are made for visas. That public interest, and the need to accord procedural fairness to the appellant, could be accommodated. They were to be accommodated, in this case, by the Tribunal telling the appellant what was the substance of the allegations made in the letter and asking him to respond to those allegations. How the allegations had been given to the Tribunal was not important. No doubt the appellant's response to the allegations would then have had to be considered by the Tribunal in light of the fact that the credibility of the person who made the allegations could not be tested. And that may well leave the Tribunal in a position where it could not decide whether the allegations made had substance. But the procedure outlined would be fair to the appellant and it would be a procedure which accommodated what Brennan J described in *Kioa* as the "problem of confidentiality". Although it may be accepted that the Tribunal sought to act fairly, the procedure it in fact adopted was not fair.*

32. The Tribunal in that case indicated that it did not consider the material because it did not think it was relevant and did not put it to the applicant.
33. Ms Watson argues that the Tribunal identified that the material was relevant and significant, and of the kind must be put to the applicant: *Kioa v West* (1985) 159 CLR 550 at 629. Also, that the Tribunal was

trying to balance the confidentiality issue, accord with natural justice and comply with s.359A.

34. In relation to the other information which the Tribunal had before it and referred to in its decision, Ms Watson submits the Tribunal was not relying on information adverse to the applicant which would form the reason for refusing the visa. Rather, it was pointing out the gaps in the material which the applicant had supplied both to the Department and to the Tribunal during the hearing.

Conclusion

35. The critical issue in this matter concerns the Tribunal's letter of 31 October 2005 addressed to the applicant and inviting him to comment on information:

The Tribunal has received information, in confidence, stating that your marriage to your nominator is contrived for the sole purpose of migrating to Australia.” (CB 128)

36. The Tribunal has identified such information as significant material of the kind that must be put to an applicant and as established in *Kioa v West* (1985) 159 CLR 550. This appears to be the Tribunal's attempt to accommodate the competing issues of confidentiality, natural justice and compliance with s.359A. The exception in s.359A(4)(c) operates in relation to information that is non-disclosable, as defined in s.5 of the Act. As material has been received in confidence it would fall within s.359A(4)(c) under the definition of non-disclosable information as the disclosure would “found an action by a person, other than the Commonwealth, for breach of confidence”. The Tribunal is under no obligation under s.359A to provide that information to the applicant. However, the Tribunal attempted to balance the requirement of natural justice by providing so much of the information as it considered could be disclosed without breaching that confidence and asking the applicant to comment on that information. What was not disclosed was how and from whom the Tribunal obtained that information. Importantly, the issue of the applicant's motivations for entering into the spousal relationship was provided, with the essential particulars, so that he could meet the case. The applicant failed to do so. I agree with the submissions made by Ms Watson that

the applicant's election not to respond was not through a lack of being put on notice that this was a critical issue for the Tribunal to consider. I accept that there has been compliance in relation to the s.359A letter in respect of the way in which the Tribunal dealt with the confidential information without breaching confidence. Consequently, the application for review claiming that the Tribunal failed to comply with the requirements of s.359A of the Act cannot be sustained and the application should be dismissed.

37. I am satisfied that an order for costs should be made in this matter. I order that the applicant pay the first respondent's costs and disbursements of and incidental to this application.

I certify that the preceding twenty-nine (29) paragraphs are a true copy of the reasons for judgment of Lloyd-Jones FM.

Associate:

Date: 27 June 2007